IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 851 of 1989

Shabira Yakub Mulani ... Appellant

V/s

The State of Maharashtra .. Respondent

Shri Rajesh Behere for Appellant

Shri V.B.Konde Deshmukh, APP for Respondent

CORAM:D.G.DESHPANDE &

S.R.SATHE,J.

DATED:16th Jan. 2007

ORAL JUDGMENT:- (Per S.R.Sathe,J.)

1. The Appellant, original accused in Sessions Case No.465 of 1988 has preferred this Appeal against the judgment and order passed by the Court of Additional Sessions Judge, Pune whereby she was convicted for the offence punishable under Section 302 of IPC and sentenced to suffer imprisonment for life.

2. The brief facts giving rise to this appeal are as under:-

. The marriage of accused Shabira Yakub Mulani, aged about 22 years had taken place with one Yakub about 4 years prior to the incident. Shabira stayed with her husband for a period of about one year. However, thereafter some dispute arose and she left her husband and started residing with her parents at village Kadade. At that time one Ahamad, brother of Jainabi used to visit his sister i.e. Jainabi at village Kadade. Accused Shabira came in his contact and intimacy developed between them. As a result of the same Shabira became pregnant from him. According to the prosecution she gave birth to a male child on 4-3-1987 at village Kadade. However, as the child was out of illicit relation she caused injury with the help of hair pin to the throat of newly born child and left the child on the bank of river Pawana.

3. On 4-3-1987 at about 12 noon PW1 Ranabai Waghmare and her husband had gone to village Kadade at Pawana river for fishing. When they were passing by the bank of river Pawana they heard cry of a child. Naturally, they went towards that direction and they found that a newly born child was lying there. The child had sustained some injury to his throat and even the umbilical cord (**NAL**) was not removed. Ranabai therefore took the said child and removed the umbilical cord and she took the child to the Police outpost of Kamshet. Police then sent her along with child to Medical Officer, Kamshet and from there to Sasoon Hospital, Pune. At Sasoon Hospital the child was admitted in Ward

NO.7. Police then recorded the statement of Ranabai which has been treated as FIR. On the basis of the same Police registered Crime No.11 of 1987 for the offence punishable under Section 317 and 307 of IPC.

4. Ranabai then pointed out the place of offence which was by the side river Pawana. Police drew panchanama of the said spot and also attached some earth containing blood from the said space. On 6-3-1987 Police came to know from Sasoon Hospital that the said child died on 5-3-1987 at 10-30. Police therefore registered the offence punishable under Section 302 of IPC.

5. Police recorded statements of various witnesses and then on the basis of those statements arrested accused Shabira on 21-3-1987. When she was in police custody she made a statement before the Police that she would point out her clothes when she delivered a child. Police therefore recorded her statement in presence of panchas and then accused who led Police and panchas to her house and there she produced her saree and some other clothes which were stained with blood. Immediately on the next day i.e. 23-3-1987 Police sent the accused shabira to Sasoon Hospital for medical examination. After her examination, doctor found that accused had delivered vaginally a child about 15 days back. When doctor asked history the accused also told that she had delivered vaginally a male child after completion of 9 months and that after the delivery she

caused injury to newly born male child and left the child at the river. When accused was in police custody on 29-3-1987 she made a statement before the Police that she would produce **CHAP** i.e. hair pin with which she caused injury to the throat of child. Accordingly, memorandum was drawn and then accused took Police and panchas to her house and there from the tiles of the roof she produced 2 **Chaps** (hair pins). Police attached the same under panchanama. Police then sent the attached articles to C.A.

6. After completion of the investigation Police submitted the charge sheet against the accused in the Court of the Judicial Magistrate, F.C., Wadgaon Mawal. Finding that accused is charge-sheeted for the offence punishable under Section 302 which is exclusively triable by the Court of Session, the learned J.M.F.C., Wadgaon Mawal committed the case to the Sessions court, Pune.

7. The Additional Sessions Judge, Pune framed charge Exh.3 against the accused for the offence punishable under Section 302 and 317 of IPC.

8. The charge was read over and explained to the accused. Accused pleaded not guilty and claimed to be tried.

9. In order to bring home the guilt of the accused, the prosecution examined in all 7 witnesses consisting of PW1 Ranabai Exh.8, PW 2- Pancha Shaikh Isav Hasanbhai Exh.10,

PW3 Pancha Bhagoji G. Kakade, PW4 Norrbi Umar Kondhalkar Exh.16, PW 5 Jainabi Dadu Shaikh Exh.17, PW 6 Dr.S.M.Dabake Exh.20 and Investigating Officer PSI R.N.Tele Exh.22.

10. Prosecution also produced the FIR Exh.9. Panchanama of the place of offence Exh.11, Panchanama of the clothes of the accused Exh.133, Memorandum of panchanama regarding production of hair pins Exh.14A and 15, post mortem Report Exh.19 and case papers of the accused Exh.21 as well as C.A. report. All this evidence will be discussed in further discussion as and when necessary.

11. After considering the evidence adduced by the prosecution the learned Additional Sessions Judge, Pune came to the conclusion that the prosecution has proved that accused has committed offence punishable under Section 302 of IPC. He, therefore, passed the order of conviction and sentence as mentioned above.

12. Being aggrieved by the said order the accused has filed the present appeal. In this appeal before us Shri Rajesh Behere, learned Advocate for the accused has urged only two points. Firstly, he submitted that the learned trial Judge has not properly appreciated the evidence and has given undue importance to the Extra Judicial Confession. Secondly, he canvassed before us that there was no evidence to show that Shabira was pregnant few days prior to incident and even if it is assumed accordingly there was in fact no

evidence to show that child found at the bank of river Pawana was the child delivered by accused Shabira. He, therefore, submitted that the appeal be allowed and the accused be acquitted.

13. As against this, the learned A.P.P.Konde Deshmukh supported the judgment and order passed by the learned trial Judge.

14. It is not in dispute that marriage of accused had taken place initially with one Yakub. After period of one year she started residing along with her parents at village Katade. It is also an admitted fact that on 4-3-1987 when PW 1 Ranabai and her husband had gone to river Pawana at village Katade for fishing, they heard the cry of newly born child. They noticed one child at the said space. PW-1 Ranabai has deposed to that effect. She has further stated that she found that there was injury to the throat of the said child. She, therefore, took the said child to the Police Outpost and therefrom she was ultimately sent to Sasoon Hospital along with the child. It is not in dispute that the said child was admitted in Sasoon Hospital on 4-3-1987 and in hospital died on 5-3-1987. Ranabai has also stated that she lodged complaint with Police and Police registered the same.

15. It is not the case of the accused that death of newly born child was accidental or natural. It is pertinent to

note that prosecution has produced at Exh.19 the post mortem report. In column no.17 of the said report external injuries found on the thorat of the said child were mentioned. The same are as under :-

1) Incised wounds - front of the neck - at the level of the thyroid cartilages - 1 1/2" x 1/2" - muscle deep - margins clean cut.

2) Contused abrasion - two - No. Just right to injury No.1, Opp. 1/4" x 1/4" reddish

3) Sutured wound - rt L Jt.- I.V.

16. The doctor has opined that these injuries 1 and 2 are anti- mortem and caused due to shock to cut throat. Thus, the death of the said newly born child is homicidal. One thing is certain that whoever has caused the said injury to the child had done so with an intention to kill the child.

17. The main and the material question is whether the prosecution has proved that death of the child was because of the acts of the accused. It was the case of the prosecution that accused Shabira had illicit relation with one Ahamad and out of the said relations she conceived a child. Because of love affair between Ahamad and accused and she was pregnant. In order to prove the same the prosecution has examined two witnesses viz. PW 4 Noorbi

Umar Kondhekar at Exh.16 and PW 5 Jainabi at Exh.17. Unfortunately, both these witnesses turned hostile. So, the prosecution could not bring positive evidence in that behalf. However, the question arises whether merely because that evidence is not produced by the prosecution it can be said that the other evidence that has been adduced is of no help to the prosecution.

18. It is an admitted fact that on 21-3-1987 Police arrested accused Shabira. When she was in the Police Station she made a statement before the Police that she would produce her clothes and accordingly Police recorded her statement in the presence of panchas. Bhagoji Kakade Exh.12 has stated that the accused led Police and panchas to her house and there she produced certain clothes including saree and some other clothes which were found to be blood stained. It must be noted that evidence in this behalf is fully supported by an independent panch witness Bhagoji Kakade. There is absolutely nothing in his cross examination to indicate that he was having a grudge or grievance against the accused or that he was under influence of Police. The accused has also not given any explanation about this evidence. So, from the evidence of above mentioned witness as well as the evidence of Investigating officer and panchanama Exh.13 it is proved that accused Shabira had produced her saree and other clothes before the Police and same were found blood stained.

19. It is an admitted fact that on 23-3-1987 accused Shabira was sent to Civil Hospital for medical examination and there Dr.Dabake examined her. He is Associate Professor and Medical Officer, Sassoon General Hospital, Pune and he is M.D. in Gynaecologist. He has stated that on 23-3-1987 he examined the accused and while giving history accused told him that she delivered vaginally a child on 4-3-1987 and thereafter she injured the child and left it on the bank of river. It is pertinent to note that doctor has mentioned this history in the case paper Exh.21. The doctor has also specifically stated that after his examination also he came to the conclusion that Shabira might have delivered the child vaginally about 15 days back. He has also stated that there may be some error of 8 to 10 days but he has categorically stated that from the examination, he was in a position to state specifically that said woman had delivered a child about 15 days back. Thus, if we take into consideration these two circumstances viz. finding of a child at the side of bank of river in injured condition and accused delivering a child then it cannot be said that this was a mere co-incidence. In fact the accused has clearly stated before doctor Dabake that after causing injury to the throat of the child she left the child at the bank of river. The doctor at the time of examination of the accused noticed his findings as below :

1. Breast - Milk secretion plus on both sides.
2. Per Abdominal - Linea Nigra plus, uterous not palpable,

no other lump palpable.
3. Local exmaination - Linear wound 1/2 cm. in length on right side and bruising on left side on the introitus.
4. Per speculam examination - Cervix upper lip lower lip seem - by feed cervix, reddish discharge plus.
5. Per-vaginal - uterous retrocverted retroplexed normal size, fornices - clear. Cervix - Oss.closed.

. The evidence of this doctor is not at all shaken or shattered in the cross examination. There was no even suggestion to him that he was having any special interest in the prosecution or that he was having any grievance against the accused. We cannot ignore the fact that he is an independent highly qualified doctor. There was no reason for him to write any false history. There is absolutely no substance in the contention that doctor may have written the said history at the instance of Police. It is pertinent to note that even in the Statement under Section 313 the accused has not stated that doctor was having any grievance against her. All that she has stated in her statement was that false case has been lodged against her at the instance of village Sarpnacha. Except this vague statement nothing has been brought on record to show that village Sarpancha was having any dispute with her or that there was any reason for him to go to the length of making such false case against the accused. Thus, we find that the accused has in fact made an Extra Judicial Confession before the doctor who is an independent respectable witness. We are aware of the

fact that evidence of Extra Judicial Confession has to be scrutinised with great caution before it is accepted and it is also necessary to see whether there is any corroborating circumstance to the said confession.

20. As mentioned above, we find that as mentioned in Extra Judicial Confession a child was found at the site of river in the injured condition. Blood stained clothes of the accused were recovered at her instance from her house. She has also produced hair pin from her house and police seized the same under panchanama. So, there is circumstantial evidence to corroborate the Extra Judicial Confession made before the doctor. The learned trial Judge after scrutinising the evidence of all the witnesses and especially evidence of PW 6 Dr. Dabake and pancha witness, found that evidence of Dr.Dabke is quite trustworthy and case papers Exh.21, wherein the history given by the accused is mentioned can be safely relied upon.

21. So, considering all this evidence the learned trial Judge has rightly held that the prosecution has proved that the accused caused injury to the newly born child and as a result of the same the child died and the accused is guilty of the offence punishable under Section 302 of IPC.

22. In this view of the matter, there is no substance in this appeal. The appeal is dismissed. Conviction and sentence of the Appellant accused is maintained. As she is

on bail, she should surrender before the trial Court within four weeks from today. If she does not surrender, the trial Court to take action as per Criminal Procedure Code to send the accused to jail to undergo the sentence awarded in this case.

(D.G.DESHPANDE,J)

(S.R.SATHE,J)